YUN HING (SABAH) SDN. BHD.

v.

SANDAKAN PLYWOOD & VENEERS CO. SDN. BHD.

HIGH COURT SABAH & SARAWAK, SANDAKAN
TUAN IAN HC CHIN J
[SUIT NO. S 178 OF 1986]
24 OCTOBER 1994

CIVIL PROCEDURE: *Stay of execution pending appeal - Grounds for stay - Principles applicable - Whether there are special circumstances - Order 47 r. 1 Rules of the High Court 1980.*

The plaintiffs sued the defendants for fees due for extraction and transportation of timber. Judgment for the plaintiffs was given on 11 June 1987 for RM1,718,731.65 upon the defendants' admission but the order pending judgment stated that execution of the judgment be stayed pending the trial of the defendants' counterclaim which was for the amount of the difference of the agreed prices of timber logs extracted to be paid by the concession owner to the defendants under the agreement between them and the agreed prices of timber logs extracted to be paid by the defendants to the plaintiffs under the sub-contract agreement (between the plaintiffs and defendants) from August 1985 until judgment. The defendants failed to take out summons for directions within one month from close of pleadings. On 3 April 1989, the plaintiffs took out summons for directions which was struck out on 26 July 1990 by the Senior Assistant Register. On 18 August 1992, the plaintiffs took out a summons to dismiss the defendants' counterclaim for want of prosecution for failure to take out summons for directions in respect of the counterclaim and/or to strike it out on the ground that it disclosed no reasonable cause of action. The counterclaim was subsequently dismissed and an appeal to the Court of Appeal was filed. In the interim, the defendants applied for a stay of execution of the judgment for the plaintiffs dated 11 June 1987.

The defendants maintained that any execution proceedings against them before the appeal hearing would greatly jeopardise and cause irreparable damage to their business as well as disrupt it and the business of their joint venture company. The issues were (i) whether the merits of the appeal were a relevant consideration and (ii) whether there are special circumstances under O. 47 r. 1(1)(a) Rules of the High Court, 1980.

Held:

[1] Merits of the appeal are a relevant consideration and may be taken into consideration with other factors to determine whether there are special circumstances. Otherwise a party may be successful in establishing special circumstances and thus obtain a stay when his appeal is devoid of merits. However the merits of the appeal on its own may not be sufficient to constitute special circumstances.

[2] A writ seizure and sale of the movable property on the defendants premises would not disrupt the business of the defendants as the plaintiffs are not entitled to seize more than what is reasonably sufficient. No evidence was given by the defendants to show that the stock of logs and machinery available for seizure does not exceed the judgment debt very much. Therefore the Court cannot say whether execution by writ of seizure and sale would hurt the defendants' business.

[3] No evidence has been given by the defendants to show that the effect of execution by prohibitory order and appointment of receiver would disrupt the business. Therefore the defendants have not made out a case that their operation would be disrupted if execution is not stayed.

[4] The defendants counterclaim far exceeded the judgment debt. Since the plaintiffs' Counsel argued that merits of appeal is irrelevant and did not agree that the appeal has no merit, it has to be concluded that he has conceded that there was merit in the appeal.

OBITER DICTUM:

The Judge had ordered a stay of execution pending "trial" of the counter claim. The parties had equated the proceedings for striking out for want of prosecution to that of a trial. If a summary dismissal is regarded as a "trial" it could be argued that the appeal constitutes a continuing process of the "trial" and thus, the "trial" is not over before the appeal is dismissed. Therefore the stay should continue. However, the defendants had not advance this argument.

[Execution of judgment to be stayed until hearing of appeal and to continue if Court of Appeal allows the defendants' appeal. Cost to the defendants].

Cases referred to:
Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd. [1989] 3 MLJ 40 ***(dist)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
Serangoon Garden Estate Ltd. v. Ang Keng [1953] 1 MLJ 116 ***(refd)***
Monk v. Bartram [1891] 1 QB 346 ***(refd)***
Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan & Anor. Application [1993] 4 CLJ 98 ***(refd)***
Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors. [1987] 2 MLJ 377 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1976] 1 MLJ 131 FC ***(refd)***
Lee Kuan Yew v. Jeyaretnam JB [1991] 1 MLJ 83 ***(refd)***

Legislation referred to:
Rules of the High Court, 1980, O. 47, r. 1

Other source referred to:
Clerk & Lindsell on Torts, 16th Edn., para. 27-72

For the defendants - Raymond Szetu, (Chan Wai Ling with him); M/s. Nicholas Fung Tokuzip & Co.
For the plaintiffs - C.C. Liew; M/s. C.C. Liew & Co.

JUDGMENT

Ian HC Chin J:

Introduction

This is an application by Sandakan Plywood & Veneers Co. Sdn. Bhd. ("the defendants") for a stay of execution as a result of the striking out by John Chong J on 30 July 1994 of the counterclaim of the defendants. A little of the history of the suit herein has to be narrated to put into perspective the issues that call for determination.

History of Case

The plaintiffs took out the writ herein against the defendants claiming for fees due for the extraction and transportation of timber. Judgment for the plaintiffs was on 11 June 1987 ordered to be entered against the defendants, upon their admission, for the sum of

RM1,718,731.65 together with costs and interests but the order giving judgment further states that "the execution of the said judgment be stayed pending the trial of the defendants' counterclaim". There was also an application of the plaintiffs to strike out the counterclaim which was dismissed. One of the allegations of the counterclaim was that the plaintiffs were in breach of the agreement (under which the plaintiffs were owed the said sum for which judgment was ordered to be entered) by failing to submit to the defendants monthly reports of all timber logs extracted giving the quantity, species and volume of the logs that were extracted by the plaintiffs. The defendants had contracted to extract and transport the timber logs with a concession owner and the defendants had in turn subcontracted the works to the plaintiffs for which the said sum was owed. The gist of the counterclaim was that the plaintiffs had failed to comply with the terms of the subcontract agreement when the plaintiffs failed to submit monthly reports of the quantity, specie and volume of timber extracted and that the plaintiffs after terminating the said subcontract agreement remained on the land concerned and continued to extract and remove timber and dealt direct with the concession owner for their payment. The defendants counterclaimed "the amount of the difference of the agreed prices of timber logs extracted to be paid by SFI to the defendants under the principal agreement and the agreed prices of timber logs extracted to be paid by the defendants to the plaintiffs under the sub-contract agreement from August 1985 until judgment". The fees payable for the extraction and transportation of timber by the defendants to the plaintiffs were:

(a) Small logs and logs of grade above - RM70 per cubic metre

(b) Low grades - RM44 per cubic metre.

As against this, the fee payable by the concession owner to the defendants was RM73.50 per cubic metre for all commercial timber. It is this difference in the contract fees that the defendants counterclaimed against the plaintiffs. As for the rest of the history I can do no better than to reproduce what was stated by John Chong J in his judgment of 30 July 1994, *viz*:

> Thus, from 11 June 1987 the action proceeded only as respects the defendants' counterclaim, and under O. 25, r. 1(1) read together with r. 1(6), the defendants, as the party making the counterclaim, were required to take out a summons for directions within one month after the close of the pleadings, but they failed to do so. What followed next appears from the case docket is that on 3 April 1989 the plaintiffs as the defendants to the counterclaim took out a summons for directions, and this the plaintiffs were entitled to do under r. 1(5). The summons for direction was fixed for hearing before the Senior Assistant Registrar on 10 October 1989 but it was adjourned upon intimation from Counsel for the plaintiffs that the sealed copy of the summons had not been returned by the High Court Registry to them for service on the defendants. It came up for hearing next on 25 June 1990, but was adjourned to 26 July 1990 and upon the application of the plaintiffs' Counsel made orally in the absence of defendants' Counsel, the Senior Assistant Registrar struck out the summons for directions. On 18 August 1992 the plaintiffs took out a summons seeking an order to dismiss the defendants' counterclaim for want of prosecution on account of failure on the part of the defendants to take out a summons for directions in respect of their counterclaim and/or to strike it out on the ground that it disclosed no reasonable cause of action. This summons came before me on 9 December 1992 but was adjourned to 5 February 1993 for argument. In the meantime, the defendants filed in a summons in chambers on 11 December 1992, applying

> for leave to amend their defence and counterclaim. It came before me on 26 January 1993 when, with the agreement of the parties, it was adjourned to be dealt with on 5 February 1993 at the hearing of the plaintiffs' application for dismissal of the defendants' counterclaim...

The defendants' counterclaim was dismissed and against which decision there is now an appeal pending in the Court of Appeal. In the meantime, the defendants had asked the Court to stay execution of the judgment which the plaintiffs had obtained against the defendants. It will be recalled that the learned Judge who entered summary judgment for the plaintiffs had ordered a stay of execution "pending trial of the defendant's counterclaim". The parties had proceeded on the basis that the stay is automatically lifted after the counterclaim had been dismissed for want of prosecution and had thus equated the proceedings relating to the striking out for want of prosecution to that of a trial. If a summary dismissal is regarded as "a trial" within the meaning of the order of stay, what then of the position of the appeal against the dismissal of the action. It could possibly be argued that the appeal constitutes a continuing process of the "trial" and thus, before the appeal is dismissed, the "trial" is not over and therefore the stay granted should continue. This application may not thus be necessary. This was not the argument advanced but the defendants had relied on "special circumstances" for a stay. It is to that aspect of the argument that I will now turn to.

Grounds for Stay of Execution.

The first of the affidavits filed in support of the application for a stay was sworn to on 13 September 1994 by Chan Wai Ling, an advocate of the firm of advocates acting for the defendants and she said:

> 9. The defendants is an ongoing concern and is actively involved in business. Any execution proceedings against them before the hearing of appeal will greatly jeopardise their businesses and cause irreparable damage which cannot be compensated by costs.

The rest of her affidavit are of no consequence. This was supplemented by an affidavit sworn to on 10 October 1994 by Dato Dr. Lee Song Kui, a director of the defendants, the relevant paragraphs of which read:

> 3. ... the defendants are operating a veneers, corestock and plywood factory at Jalan Batu Sapi, Mile 6, Sandakan jointly with Sandakan Blockboard Manufacturing Sdn. Bhd.
>
> 4. Any execution proceedings levied against the defendants will not only [disrupt] the business of the defendants but also that of its joint venture company."
>
> 5. The defendants and Sandakan Blockboard Manufacturing Sdn. Bhd. are interdependent of each other and together they employ over 600 workers. These workers will become jobless if the operation of the factory is brought to a stand still.
>
> 6. I am advised and verily believe that the defendants have a plausible counterclaim against the plaintiffs. It is a fact that the plaintiffs continue to extract timber from the coupe area known as "Coupe 85" released to the defendants even after the purported termination knowing at all material times that the coupe area was already released to the defendants as indicated in a letter from Sandakan Forest Industries Sdn. Bhd. (hereinafter referred to as "SFI") dated 6 March 1985. The map showing the Coupe 85 area is contained in the defendants letter dated 31 January 1985 to SFI...
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> 7. As from August 1985, the plaintiffs have stopped submitting to the defendants the monthly report on volume production even though they have continued to extract timber from Coupe 85 and other areas which was contracted to the defendants under Special Licence no.6/83 (hereinafter referred to as the said area) by SFI on 9 August 1983. The plaintiffs have knowledge of the aforesaid contract...

8. By reason of the aforesaid, the defendants counterclaim against the plaintiffs for the sum of RM1,457,350.35 the particulars of which are as follows:

Estimated monthly volume of production by the plaintiffs in defendants' area:	720,000 cu ft.
Difference in contract price:	0.126 cents. per cu ft.
Balance owing to the defendants: (From August 85 - July 88)	3,176,082.00
Less	1,718,731.65
	1,457,350.35

The Law

The present application for a stay is grounded on O. 47, r. 1 of the Rules of the High Court, 1980 which says:

> 1(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution -
>
> (a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or
>
> (b) that the applicant is unable from any cause to pay the money,
>
> then notwithstanding anything in r. 2 or 3, the Court may by order stay the execution of the judgment or order by writ of seizure and sale either absolutely or for such period and subject to such condition as the Court thinks fit.
>
> (2)... (3)... (4)... (5)...

The only dispute regarding the legal principle is as regards whether the merits of an appeal is a relevant consideration. Mr. C.C. Liew, Counsel for the plaintiffs, had argued that it is irrelevant and referred to *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 3 MLJ 40, a decision of N.H. Chan J where it was held that merits and strong ground for an appeal and the validity or correctness of the decision appealed from are not special circumstances and reliance was placed on *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406 (a decision of Hashim Yeop Sani J (as he then was) which latter case adverted to *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] 1 MLJ 116. I will first refer to *Serangoon Garden Estate Ltd. v. Ang Keng* where it is said, at p. 116,:

> But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can shew special circumstances to justify it. The only ground, so far as appears in the written grounds for granting this stay, is that if the defendant succeeded in his appeal he could not be restored to the same position as before because the plaintiffs would have removed his pig-sty. That ground, standing alone, in my opinion cannot be a sufficient ground on which to grant a stay of execution. It seems to me that to hold otherwise would be to establish a precedent, and in effect to lay down a rule of practice, that in all cases where the defendant cannot be restored to his original position if his appeal succeeds, a successful applicant is to be deprived of the fruits of his litigation until such time as the appeal is determined. Such a ground might well be an important factor to take into consideration if there were other grounds. **If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendants, if successful, could not be restored to his original position**

> **might well have afforded special circumstances** to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have thought it right to interfere. [Emphasis added]

It is clear that *Serangoon Garden Estate Ltd. v. Ang Keng* was of the view that the merits in the appeal is a relevant consideration in determining whether they are special circumstances. As was said earlier, this case was referred to in *Syarikat Berpakat v. Lim Kai Kok* but *Syarikat Berpakat v. Lim Kai Kok* obviously did not agree with the proposition that the merits of an appeal is a relevant consideration, despite saying the case lays down the general principles regarding a stay of execution because Hashim Yeop Sani J (as he then was) went on to state, after citing *Monk v. Bartram* [1891] 1 QB 346, that "allegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances" and thus the learned Judge was of the opinion that merit in an appeal cannot constitute special circumstances. The learned Judge never gave his reason for refusing to follow *Serangoon Garden Estate Ltd. v. Ang Keng* which was of the view that the merit in an appeal is a relevant consideration and, when considered with other factors, may constitute special circumstances for a stay. Why should not the Court follow *Monk v. Bartram*. First, it has to be noted that *Monk v. Bartram* was a case that was already tried with a jury and the verdict was given in respect of which a stay was sought and the only ground advanced for a stay was that there was a misdirection at the trial. This was what Lord Esher MR said in that case:

> Since the Court has had to deal with motions for new trials, instead of their going to a Divisional Court, we have been most anxious not to change the practice which prevailed in the Divisional Court, and not to alter the rights of the parties. We have made inquiries, and find that the practice in the Divisional Court has been similar to that as to appeals in this Court in cases of trials before a Judge without a jury. It has never been the practice in either case to stay execution after the Judge at the trial has refused to grant it, unless special circumstances are shewn to exist. It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution. No special circumstances are brought forward in this case, the only ground for the application being that a motion is to be made for a new trial on the ground of misdirection. The application must, therefore, be refused.

The most significant difference between *Monk v. Bartram* and the present case is that in our case there was no trial at all while in that case there was a trial with a jury and this is a relevant factor and I have the occasion in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan & Anor. Application* [1993] 3 MLJ 514; [1993] 2 AMR 36:2095; [1993] 4 CLJ 98 to, following VC George J in *Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors.* [1987] 2 MLJ 377, so say. I am of the view that *Monk v. Bartram* never decides that the merit of appeal cannot be a relevant consideration but the case merely decides that the merit of an appeal is, by itself, not enough to constitute special circumstances. If the merit or demerit of an appeal is not a relevant consideration you may find that a party may be successful in establishing special circumstances and thus obtain a stay when his appeal is devoid of merits; such a result is surely undesirable and surely is not what society approved of. It is not insignificant that in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131 FC, at p. 132, the Court there speaks in these terms, *viz*:

> However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v. Bartram*

Similarly, the case of *Lee Kuan Yew v. Jeyaretnam* JB [1991] 1 MLJ 83, at p. 85, also speaks in similar vein, *viz*:

> However, the fact that there may be strong grounds for an appeal is not by itself a reason for granting a stay...

Both these cases talk about insufficiency rather that it being totally irrelevant, the merit of an appeal being a factor bringing it within the meaning of special circumstances. Hence, I am of the view that the merit of an appeal though on its own may not be sufficient to constitute special circumstances, may be taken into consideration with other factors for the purpose of determining whether there are special circumstances. I would respectfully, for the reasons I have given, differ in so far as *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* were to decide that the merit of an appeal is under no event to be a relevant consideration. I am not unaware that a Judge may be placed in a position of having to review his decision which is appealed against or having that decision being reviewed by another Judge of co-ordinate jurisdiction. I do not think this should pose any problem as the finding of merit is only a finding *prima facie*. After all, Judges have been giving leave to appeal against their decisions. I will proceed to consider whether there is any merit in the appeal against the order striking out the defendants' counterclaim and, if there is merit, whether there are factors that would constitute special circumstances. I will deal first with the other factors.

Whether there are special circumstances

The defendants maintain that any execution would disrupt their business and that of their joint venture company since, according to the defendants, the seizure would bring the operation of their factory to a stop. How the execution of a judgment will have that effect had not been explained. It is left to the Court to see whether all or any of the methods of execution will have the effect, which the defendants alleged. I will first consider the effect of a writ of seizure and sale which affects movable properties. Since the trade of the defendants revolves primarily around timber and the processing of timber, it is to be expected that whatever logs and machinery belonging to the defendants may be seized in execution. Unfortunately no details have been provided as to the cost of the machinery nor as to the volume and cost of timber that may be expected at any day to be in the factory against which the seizure may be directed at. If the logs alone that are available for seizure have a market value of, say, RM10 million, a seizure would not have the effect of disrupting the business of the defendants because the plaintiffs are not entitled to seize more than what is reasonably sufficient or else the plaintiff shall be liable to the defendants for damages for excessive levy. The law is stated by *Clerk & Lindsell on Torts*, 16th Edn. at para. 27-72, in this way:

> **How much should be seized**. The duty of those who levy execution is confined to seizing goods reasonably sufficient, when they are sold, to satisfy the relevant indebtedness of the judgment creditor. Therefore a seizure that is excessive, even though it is not malicious, gives rise to liability in respect of any damage caused to the debtor. If malice is proved there may be claim for exemplary damages...

That means, the defendants would still have a lot of logs to process and thus continue with its operation even if there is a seizure and sale since such seizure and sale is limited to what is reasonably sufficient to satisfy the judgment debt of more than RM1.7 million. The same can also be said in the case of the machinery. The alleged disruption in the business of the defendants can only hold true if it is shown to the Court that the value of the stock of logs and machinery available for seizure does not exceed very much the value of, say RM2 million

which would mean that the plaintiffs are entitled to seize all there is in the factory of the defendants and thus bring to a halt the operation of the business of the defendants and its joint venture company. As I have said earlier, no such evidence was forthcoming with the result that the Court cannot say whether a writ of seizure and sale will have the result of bringing to a half the operations of the defendants and its joint venture company. Another form of execution is by the seizure of lands through lodging prohibitory order. Again, no evidence is forthcoming as regards what lands the defendants have which seizure may disrupt their business. Yet another form of execution is the appointment of receiver for the purpose of equitable execution but this manner of execution does not disrupt the business of the defendants. All in all, the defendants had not come forth with enough evidence for the Court to act upon. Therefore a case has not been made out that their operations would be disrupted if execution is not stayed.

The next argument advanced by Mr. Raymond Szetu, Counsel for the defendants, was that the defendants' counterclaim far exceeded that of the judgment debt and that a stay had in fact already been granted but the stay had, according to the parties, been automatically lifted as a result of the striking out of the defendants' counterclaim for want of prosecution. Mr. C.C. Liew argued that it is no longer of relevance not only because there was no longer any counterclaim but also because it is immaterial that the appeal has merit which latter contention I have already dealt with. Since Mr. C.C. Liew did not argue otherwise, I take it that there is substance that the defendants' counterclaim could be in the region of about RM3.1 million which far exceeds that of the judgment debt of RM1,718,731.65. Since this must have been the factor that influenced the learned Judge who granted the stay of execution in the first place, the factor still pertains if there is merit in the defendants' appeal against the striking out order. Since Mr. C.C. Liew rested his argument on the proposition that the Court cannot take into account the merit of the appeal and did not argue that the appeal has no merit and since I have, contrary to what Mr. C.C. Liew had submitted, ruled that the merit of an appeal is a relevant factor, it has to be concluded that Mr. C.C. Liew had conceded that there was merit in the appeal. Since there was merit in the appeal, the counterclaim far exceeds that of the plaintiffs' claim and the defendants' counterclaim was struck out without a trial, I order that execution of the judgment be stayed until after the hearing of the appeal against the decision striking out the counterclaim by the Court of Appeal and the stay is to continue if the Court of Appeal shall allow the appeal. Cost to the defendants.

I have just gone through the calendar of this Court and I find that any case that is entered for trial now can be heard in August 1995 which means the stay will only last till that time if ever there is going to be a trial.